Supreme Court of the United States

October Term, 1960.

No.

GEORGE COOPER, ALEX S. TODEROFF, EDWIN D. RICH, ALBERT G. JEFFRIES, FLOYD L. CLEMENS and RALPH LEVERSON,

Appellants,

vs.

PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION TO DISMISS APPEALS.

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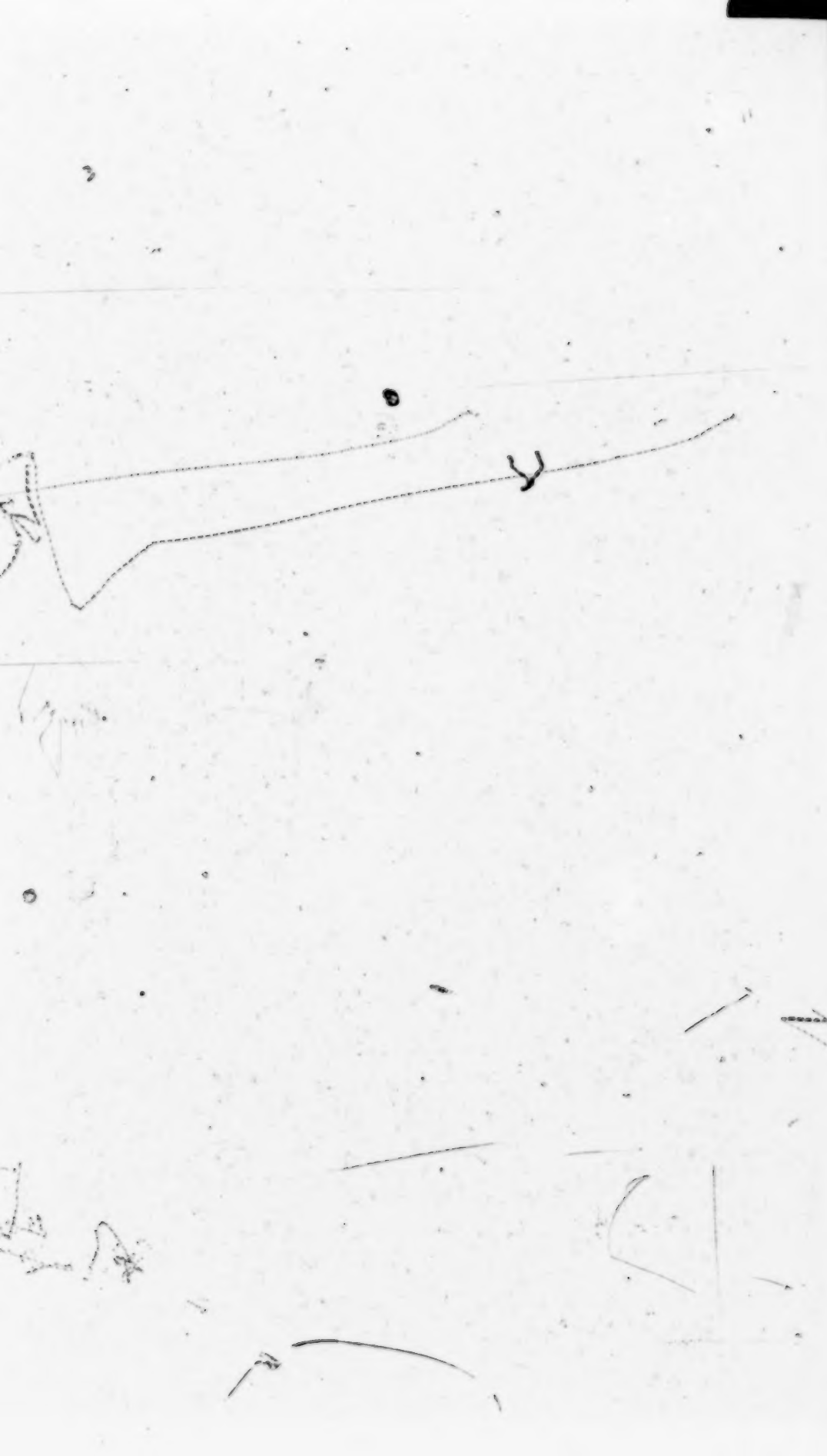

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IN THE

SUPREME COURT OF THE UNITED STATES.

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No.

GEORGE COOPER, ABE S. TOBEROFF, EDWIN D. RICH, ALBERT G. JEFFRIES, FLOYD L. CLEMENS AND RALPH LEVERSON,
Appellants,

vs.

PETER J. PITCHESS, SHERIFF OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AND PEOPLE OF THE STATE OF CALIFORNIA,
Appellees.

MOTION TO DISMISS THESE APPEALS.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States (1959 Pocket Supp.), move that these appeals to the above entitled court be dismissed.

This motion to dismiss these appeals is made upon the following grounds:

(1) That the appeals herein do not present a substantial federal question.

(2) The decision of the Supreme Court of California rests on an adequate non-federal basis.

I.

THE QUESTION PRESENTED.

The question urged by appellants revolves around the constitutionality of Section 1549.1 of the California Penal Code.

This section was adopted in 1937 from Section 6 of the Uniform Criminal Extradition Act.

This section is analyzed in 21 Cal. Jur. 2d, Section 22, pp. 632-633, as follows:

> "Although in extradition proceedings under the act of Congress the right to extradite depends on whether the person sought to be extradited has fled from the justice of the demanding state after having committed a crime while present there, that statute is not the exclusive source from which the authority to extradite springs. Citing *In Re Morgan*, 86 Cal. App. 2d 217, 194 P. 2d 800. Under the Uniform Criminal Extradition Act, which has been adopted in California, Penal Code Sections 1548-1558, there is a permissive provision authorizing the governor to surrender on demand of the executive authority of another state a person found in this state and charged in the other state with commission of an act in this state or in a third state intentionally resulting in a crime in the demanding state . . . . The cases dealing with extradition under the federal statute are not controlling where extradition is sought under this state statute, which extends the power of extradition beyond that contained in the federal legislation." (Cf. Anno. 151 A. L. R. 239.)

In the decision of the Supreme Court of California in the habeas corpus proceedings on review in this present case, this code section is considered. We find the following statement (*In Re Cooper*, 53 Cal. 2d 772, 775-776):

> "It is settled, however, that the federal constitutional and statutory provisions are not exclusive and that the states are free to cooperate with one another by extending interstate rendition beyond that required by federal law.
>
> Citing cases.
>
> "The United States Supreme Court approved such cooperation in sustaining a Florida statute (Fla. Stat. 1957, Sections 942.01-942.06 F. S. A.) . . . ."

The decision in *In Re Cooper* quotes (53 Cal. 2d 776) from *People of the State of New York v. O'Neill*, 359 U. S. 1, 6 (79 S. Ct. 564, 3 L. ed. 2d 585, 589), which states:

> "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution.
>
> "Far from being divisive, this legislation is a catalyst of cohesion. It is within the unrestricted area left to the States by the Constitution."

The *Cooper* decision continues and concludes this particular discussion with the statement:

> "Far more divisive than a state's refusal to extradite a fugitive for a past offense would be its unwitting provision not only of a base of operation but of an asylum for those who commit crimes without being personally present at the place where their crimes are consummated. The Legislature validly enacted section 1549.1 to prevent that result." (53 Cal. 2d 776.)

(See *Seward v. Heinze* (1958), 262 F. 2d 42, a habeas corpus proceeding involving an extradition effected under the Uniform Act for Out-of-State Parole Supervision, under a valid compact between California and Washington.)

II.

APPELLANTS' POINT (1).

Appellants advance the proposition in their question (1) that said Penal Code Section 1549.1 abridges free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution and other constitutional "freedoms" because it authorized California to surrender these appellants to Pennsylvania on an indictment for crime "without claim that the persons sought to be extradited were ever in the demanding state at the time of the commission of the alleged offenses or fled therefrom . . . ." (Juris. Stmt. p. 5.)

In essence, this is a contention that the Federal Extradition Statute (18 U. S. C. Section 3182) is exclusive. This claim is no longer tenable. The limitations on Congress under the Constitution are referred to in *In Re Morgan* (1948), 86 Cal. App. 2d 217, 194 P. 2d 800. It is clear that Congress is without power to provide for extradition of a person who is not a fugitive from the demanding state, and who so acts in one state as to commit a crime in another state which he never enters. As far back as 1915 in the case of *Ex Parte Innes* (1915), 77 Tex. Crim. Rep. 351, 179 S. W. 291, L. R. A. 1916C 1251 (affirmed in 240 U. S. 127, 60 L. ed. 562, 36 S. Ct. 290), is the following statement:

> ". . . Before the forming of the Union each state was a separate and independent sovereignty, and in forming the Union they parted with only such sovereign power as was ceded to the general government,—all

> other powers of sovereignty inherent in them was reserved to each state, and we can see no good reason why a state cannot provide for the surrender of persons charged with crime in a sister state not provided for in the cession to the federal government or in furtherance of the ceded power . . .

It can scarcely be seriously contended at this time that the constitutionality of California Penal Code Section 1549.1 raises a substantial federal question.

III.

APPELLANTS' POINT (2).

Appellants' second approach to the constitutionality of said Penal Code Section 1549.1 advances the proposition that the requirements of said section are not met by the indictment and affidavits accompanying the demand, and for such reason appellants will be arbitrarily and capriciously deprived of liberty and property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. (Juris. Stmt. pp. 5-6.)

It may be stated initially that an indictment is merely the first accusatory pleading on the part of the People (California Penal Code Section 949). It may be in substantially the form set out in Penal Code Section 951. Section 960, California Penal Code provides:

> "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (See *People v. Brennan* (1898), 121 Cal. 495.)

The test of the indictment, under California law, is declared in California Penal Code Section 995. This section provides that an indictment must be set aside by the court in which the defendant is arraigned, "1. Where it is not found, endorsed, and presented as prescribed in this code. 2. That the defendant has been indicted without reasonable or probable cause."

The standard formula of "reasonable or probable cause" is as follows:

> "Reasonable or probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (26 Cal. Jur. 2d Sec. 82 p. 569; *People v. Nagle* (1944), 25 Cal. 2d 216, 153 P. 2d 344.)

An indictment in the words of the statute is permissible under California procedure (California Penal Code Section 952; *People v. Finley* (1959), 174 Cal. App. 2d 206, 210), and Pennsylvania procedure (Act of Assembly 1860, March 31, Pamphlet Law 427, Section 11; 19 Purdon's Pennsylvania Statutes Sections 261).

Not infrequently an indictment or a criminal complaint is issued in ignorance of the necessity for extradition. The requirements of extradition procedures must in such cases be appended to the rendition papers. It is not unusual therefore for the "accompanying documents" to supplement the original accusatory pleading. The Uniform Act provides for this and is embodied in Section 1548.2 of California Penal Code in stating the demand "shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding state . . ."

In the instant case, there is a criminal complaint sworn to before a magistrate titled, "Criminal Complaint for Warrant of Arrest". Each of the said affidavits describes appellants' distribution of obscene literature in Pennsylvania by mail from California and each contains a paragraph in substantially the following form:

"Deponent further avers that, by reason of the said act and acts of depositing the said literature and written and printed matter in the United States Mail for delivery and distribution to the said private citizens in and about the said City and County of Philadelphia, and well knowing and intending that the said literature would be so delivered and distributed, the said Floyd Clemmens did do such act and acts in the said State of California which intentionally resulted in the commission of the crime of Distributing Obscene Literature in the said City and County of Philadelphia as prohibited by the Act of the General Assembly of this Commonwealth and which is against the peace and dignity of the Commonwealth." (See California Supreme Court opinion in present case, 53 Cal. 2d 777.)

The inquiry by the governor of the asylum state in the ordinary extradition demand is addressed to just two questions:

"(1) Is the person demanded substantially charged by an indictment or affidavit properly certified with the crime against the laws of the state from whose justice it is alleged that he has fled? (2) Is he a fugitive from justice from the state demanding him? The first is a question of law, while the second is a question of fact.

"The governor's judgment thereon is not subject to judicial impeachment by habeas corpus, unless it conclusively appears that the person sought to be extradited could not be a fugitive from justice under the law. . . ." (*In Re Fedder* (1956), 143 Cal. App. 2d 103, 111-112.)

California Penal Code Section 1548.3 provides for an investigation by the governor of the demand and for a report as to the "situation and circumstances of the person so demanded, and whether he ought to be surrendered according to the provision of this chapter".

It is clear that these considerations justified the California Supreme Court in its decision in concluding that "in each case the affidavit and indictment dovetail to meet the requirements of Section 1549.1 and 1548.2" of the California Penal Code (53 Cal. 2d 778).

In *People ex rel. Hackler v. Lohman* (1959), 160 N. E. 2d 792, at page 799, is the following statement:

> "The real issue in a *habeas corpus* proceeding is whether the prisoner is illegally restrained. In an extradition proceeding, the initial inquiry is whether the rendition warrant is prima facie sufficient to justify the detention (case cited). By the weight of authority, however, legal deficiencies in the rendition warrant may be cured in *habeas corpus* proceedings for the discharge of the fugitive, by including with the return of the Sheriff, or producing at the hearing the papers on which the warrant was issued which show on their face that they are in due legal form, and that the warrant was justified. 22 Am. Jur. par. 51 p. 289 (also see Sec. 52); 89 A. L. R. 599.
>
> * * * * * * * * *
>
> "An examination of the documentary exhibits which were filed with the request for extradition in this case shows that the governor was fully justified in issuing the rendition warrant."

This reasoning applies equally to the present case. As to the affidavits themselves, the California Supreme Court in *In Re Cooper*, 53 Cal. 2d 772, 778-779, states as follows:

> "The affidavits do not set forth the affiants' source of information or reasons for belief that petitioners had committed the offenses charged, but the purpose of the requirement that they do so is fully met when as in these cases the indictments establish reasonable cause to believe petitioners guilty of the offenses charged and the affidavits demonstrate that the indictments are

> based on petitioners' California activities. . . . It must be presumed that sufficient evidence was presented to the Grand Jury to support the indictments, and as prosecuting witnesses the affiants knew of their own knowledge that the indictments were based on petitioners' California activities. Under such circumstances the respective governors were bound to know that the indictments were based on petitioners' activities set forth in the affidavits, including their acts in California intentionally resulting in crimes in Pennsylvania."

As charging a crime recognizable under Pennsylvania law, the indictments are sufficient on their face, and as supplying the requirements for extradition under 1549.1 California Penal Code, the affidavits themselves are sufficient to satisfy the governor in the asylum State of California that extradition warrants should issue. No more is required in a habeas corpus proceeding in extradition in advance of trial or other action by the courts of the demanding state. (*Compton v. Alabama* (1908), 214 U. S. 1, 8 (29 S. Ct. 605, 53 L. ed. 885), states as follows:

> "When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis, in law, for their acting,—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive,—the judiciary should not interfere, on habeas corpus, and discharge the accused upon technical grounds, and unless it be clear that what was done was in plain contravention of law."

IV

APPELLANTS' POINT (3).

Appellants urge that said Section 1549.1, California Penal Code, is null and void under Art. VI, Section 2, Clause 2 of the Constitution of the United States, contending that said Section 1549.1 is repugnant to and in conflict with federal law in a field exclusively delegated to the federal government. This contention cannot stand. It has been discussed previously in this brief and is contrary to authority. (*People of the State of New York v. O'Neill*, 359 U. S. 1, 3 L. ed. 585, 79 S. Ct. 564, 568; *In Re Tenner*, 20 Cal. 2d 670, 677, 128 P. 2d 338; *In Re Morgan*, 86 Cal. App. 2d 217, 223, 194 P. ed. 800; *Ex Parte Morgan*, D. C. 78 F. Supp. 756, 761 aff'd, *Morgan v. Horrall*, 9 Circ., 175 F. 2d 404, 407.)

V.

APPELLANTS' POINT (4).

Appellants attack the constitutionality of the Pennsylvania Statute under which these appellants were indicted (Juris. Stmt. p. 7).

On habeas corpus in an extradition proceeding the courts of the asylum state need not and should not review the constitutionality of the statute under which petitioners have been charged.

(*In Re Uran* (1956), 138 Cal. App. 2d 479, 480-481 (292 P. 2d 225); *Johnson v. Matthews*, (1950)—Dist. Col. 182 F. 2d 677, 682; *Collins v. Traeger*, (1928)—9th Cir. 27 F. 2d 842, 846; *Pearce v. State of Texas*, (1894) 155 U. S. 311-314, 15 S. Ct. 116, 39 L. ed. 164; *Ex Parte Key*, 164 Tex. Crim. R. 524, 301 S. W. 2d 90, 91; *Ullom v. Davis*, 169 Miss. 208, 150 So. 519, 521; see *Ross v. Middlebrooks*, (1951) 9 Circ.

188 F. 2d 303, [illegible]. *In Re Ba[illegible]*, 38 Cal. App. 2d 500, 501-503 (220 P. 2d 742); see *In Re Cooper*, 53 Cal. 2d 772, 779 (349 P. 2d 956).

The constitutionality of that statute may depend upon how the courts of the demanding state interpret and apply it. As stated in *In Re Katcher* (1952), 39 Cal. 2d 30, 31 (243 P. 2d 785):

> "The applicable rule was stated by Chief Judge Cardozo in *People ex rel. Hayes v. McLaughlin*, 247 N. Y. 238, 241 (160 N. E. 35, 358), as follows: 'The question is whether "the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled" (*Pierce v. Creecy*, 210 U. S. 387, 28 S. Ct. 714, 52 L. ed. 1113). A grand jury . . . has said that what has been charged against him is there a crime. The governor has said the same. Unless a reasonable basis for what they say is lacking altogether, unless the indictment is so frivolous or contradictory as to be a presentment of innocence rather than of crime, we do not go beyond the documents when flight is once established. Doubt, if there is any, must be resolved in the demanding state (*Hogan v. O'Neill*, 255 U. S. 52, 55 (41 S. Ct. 222, 65 L. ed. 497); *Drew v. Thaw*, 235 U. S. 432, 439 (35 S. Ct. 137, 59 L. ed. 302); *Munsey v. Clough*, 196 U. S. 364, 373 (25 S. Ct. 282, 49 L. ed. 515).' See *Compton v. Alabama*, 214 U. S. 1, 8 (29 S. Ct. 604, 53 L. ed. 885), where is found the succinct statement, '. . . the judiciary should not interfere, on habeas corpus, and discharge the accused upon technical grounds, and unless it be clear that what was done was in plain contravention of law.'"

VI.

APPELLANTS' POINTS (5) AND (6).

Appellants' point (5) (Juris. Stmt. p. 8) declares said California Penal Code Section 1549.1 to be repugnant to and in conflict with 18 U. S. C. 1461, 1462, and Art. VI of the United States Constitution, and point (6) (Juris. Stmt. p. 8) is to the same effect.

This contention is answered briefly in *In Re Cooper*, 53 Cal. 2d 772, 782:

> "Petitioner's contention that the Pennsylvania statute may not be applied to their mail-order business on the ground that Congress preempted the field by enacting the federal statute punishing the mailing or advertising by mail of obscene material (18 U. S. C. A. Section 1461) was answered adversely to them in the *Alberts* case" (354 U. S. 476, 493-494, 77 S. Ct. 1304, 1 L. ed. 2d 1498), where is found the following statement:
>
> "Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, Section 8, Cl. 7, under which the Congress allegedly preempted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions."

As to the test for obscenity as applied to appellants in the instant case, it must be borne in mind that this appeal has arisen out of a petition for Writ of Habeas Corpus, attacking the California Governor's Warrant of Rendition is-

sued after demand by the Governor of Pennsylvania. The petition for such writ was denied by the California District Court of Appeal. It was denied by the California Supreme Court, and petition for rehearing was likewise denied. (See Juris. Stmt. pp. 14-17.) No trial has been had and no evidence presented. The statute involved has therefore not been interpreted as applied to these appellants, as it had been in *Smith v. California*, 80 S. Ct. 215. (See 53 Cal. 2d 782.) It is stated in *Alexander v. United States*, C. A. Minn. (8th Cir.) 1959, 271 F. 2d 140, 145-146, a case arising under said Section 18 U. S. C. A. Section 1462 as follows:

> "On the issue of obscenity the test stated in *Roth v. United States*, supra, 354 U. S. at page 489, 77 S. Ct. at page 1311, is 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.'
>
> ". . . It is for the jury to determine the weight of all testimony including expert testimony. . . . The primary responsibility for determining the obscenity issue is upon the jury . . ."

VII.

ADDITIONAL MOTION BY PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY.

On October 30, 1959, William C. Mathes, United States District Judge in the United States District Court, Southern District of California, Central Division, granted writs of habeas corpus and released each appellant on bail in the sum of one thousand dollars ($1,000) in cases number 1118-59 PH to 1123-59 PH, inclusive. Appellants are still at large on this bail.

Appellant Peter J. Pitchess, Sheriff of Los Angeles County, therefore, moves to dismiss the appeal, as to him,

for the additional ground that he is not a proper party to these appeals.

CONCLUSION.

These appeals from a state court decision on habeas corpus arising from extradition proceedings attempt to raise questions which could properly be raised only on an appeal from a conviction. The only questions presented to the Supreme Court of California were whether the federal constitutional and statutory provisions pertaining to interstate extradition are exclusive and whether the demand of the Governor of Pennsylvania with its supporting documents constituted a sufficient compliance to Section 1549.1 of the California Penal Code. The first of these questions has been decided adversely to appellants by this honorable court. *People of the State of New York v. O'Neill*, 359 U. S. 1, 79 S. Ct. 564, 568, 570, 3 L. ed. 2d 585. (See also *In Re Tenner*, (1942) 20 Cal. 2d 670, 677, 128 P. 2d 338; *In Re Davis*, (1945) 68 Cal. App. 2d 798, 802, 30[illegible]58 P. 2d 36; *In Re Morgan*, (1948) 86 Cal. App. 2d 217, 223, 194 P. 2d 800; *Ex Parte Morgan*, (D. C. S. D. Calif. 1948), 78 F. Supp. 756, 761, affirmed *Morgan v. Horrall*, (9th Circ. 1949), 175 F. 2d 404, 407; see 9 Uniform Laws Annotated 299.) The decision on the second question rests on an adequate non-federal basis as it involves only one interpretation of a state statute. Thus these appeals do not present a substantial federal question.

Appellants have been substantially charged with crimes under the laws of Pennsylvania. The Governor of California, after investigation as required, is satisfied there is reasonable and probable cause for accepting the determination of the Governor of Pennsylvania that such crimes have been substantially charged, and the requirements of Section 1549.1 of the California Penal Code are fairly met. The constitutionality of Pennsylvania statutes is not a subject for the courts of the asylum state.

For the foregoing reasons Appellees move that these appeals be dismissed.

Respectfully submitted,

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